

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS WHITLOW,

Defendant.

4:14-CR-3015

ORDER

This matter is before the Court on the defendant's notice of appeal ([filing 361](#)). Because the defendant was previously found to be eligible for appointment of counsel, he would normally be allowed to proceed on appeal *in forma pauperis* without further authorization. [Fed. R. App. P. 24\(a\)\(3\)](#). But an appeal may not be taken *in forma pauperis* if the trial court certifies in writing that the appeal is not taken in good faith. [28 U.S.C. § 1915\(a\)\(3\)](#); [Fed. R. App. P. 24\(a\)\(3\)\(A\)](#).

An appellant demonstrates good faith by seeking appellate review of any issue that is not frivolous. [Coppedge v. United States](#), 369 U.S. 438, 445 (1962); [Ellis v. United States](#), 356 U.S. 674, 674 (1958). An indigent appellant should be allowed to proceed *in forma pauperis* unless the issues raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant. [Coppedge](#), 369 U.S. at 447; [Ellis](#), 356 U.S. at 675. An appeal is frivolous where none of the legal points are arguable on their merits—when the result is obvious or the appellant's argument is wholly without merit. *See*, [Neitzke v. Williams](#), 490 U.S. 319, 325 (1989); [Misischia v. St. John's Mercy Health Sys.](#), 457 F.3d 800, 806 (8th Cir. 2006).

The basis for the order being appealed ([filing 360](#)) was that the defendant's motion was a "second or successive" [28 U.S.C. § 2255](#) motion,

requiring authorization from the Court of Appeals the defendant has not obtained. There is no reasonable basis to dispute that conclusion: as explained in the Court's order, the defendant's motion was wholly directed at the validity of his underlying conviction, and must be treated as a § 2255 motion. [Filing 360](#). Any argument to the contrary is frivolous.

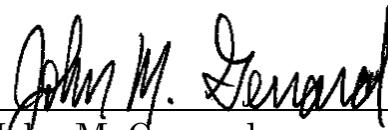
Accordingly, the Court finds that the defendant's appeal is not taken in good faith, and that he is not entitled to proceed *in forma pauperis*.

IT IS ORDERED:

1. The defendant's appeal is not taken in good faith, and he is not entitled to proceed *in forma pauperis* on appeal.
2. The Clerk of the Court is directed to forward a copy of this order to the Eighth Circuit Court of Appeals.

Dated this 10th day of April, 2018.

BY THE COURT:



John M. Gerrard
United States District Judge